Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

(12)

No. 92-6281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF FOR THE RESPONDENT

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General of Utah
MICHAEL M. QUEALY
(Counsel of Record)
Assistant Attorney General
1636 West North Temple
Salt Lake City, Utah 84116
(801) 538-7227

Attorneys for Respondent

BEST AVAILABLE COPY

No. 92-6281

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF FOR THE RESPONDENT

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General of Utah
MICHAEL M. QUEALY
(Counsel of Record)
Assistant Attorney General
1636 West North Temple
Salt Lake City, Utah 84116
(801) 538-7227

Attorneys for Respondent

QUESTION PRESENTED

Has the Act of May 27, 1902, 32 Stat. 245, as amended, diminished the Uintah Valley Reservation and restored the unallotted lands to the public domain, so that the town of Myton, Utah--where Petitioner Hagen committed a third-degree felony--is within the State of Utah's criminal jurisdiction?

TABLE OF CONTENTS

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. STATE v. HAGEN 2

B. STATE v. PERANK 4

C. OVERVIEW OF THE AREA IN DISPUTE AND THE STATUTE RESTORING THE LANDS TO THE PUBLIC DOMAIN 5

1. The Disputed Lands Do Not Involve Tribally-Owned Trust Lands 5

2. The Act of May 27, 1902, as Amended, Provides a Comprehensive and Detailed Scheme for Opening the Reservation and Restoring the Surplus Lands to the Public Domain 6

3. State and Local Officials Have Historically Treated the Unallotted Lands as Within Their Jurisdiction ... 9

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THE ACT OF 1902, AS AMENDED, RESTORED THE UNALLOTTED LANDS TO THE PUBLIC DOMAIN AND DIMINISHED THE UINTAH VALLEY RESERVATION ... 13

A. THE LANGUAGE OF THE 1902 ACT AND ITS AMENDMENTS, VIEWED IN THE CONTEXT OF THEIR PASSAGE AND SUBSEQUENT EVENTS, CONFIRMS CONGRESSIONAL INTENT TO DIMINISH THE UINTAH VALLEY RESERVATION 13

1. The Disputed Area Lost its Indian Character Long Ago, and Leaving the Original Uintah Valley Reservation Boundary Intact Will Not Materially Advance the Interests of Tribal Sovereignty, But Will Severely Hamper the Functioning of State and Local Governments 14

2. The Operative Language of the 1902 Act--"Restored to the Public Domain"--Evidences Congressional Intent to Diminish the Uintah Valley Reservation 17

3. The 1903 Act, Which Amended the 1902 Act and Eliminated the Requirement that the Indians Consent to Opening the Reservation, Confirms Congress's Intent to Diminish the Reservation 20

4. The 1905 Act Cannot be Read Apart from the 1902 Act It Amends 23

5. The Presidential Proclamation of July 14, 1905, Opening the Reservation, Confirms that the 1902 Act Was Controlling 28

B. PETITIONER, THE UNITED STATES, AND THE TENTH CIRCUIT TAKE AN UNDULY NARROW VIEW OF THIS COURT'S HOLDING IN SOLEM AND INCORRECTLY APPLY IT TO THE FACTS AND CIRCUMSTANCES OF THIS CASE 34

1. The Tenth Circuit's Decision in Ute Tribe is Inconsistent With This Court's Prior Diminishment Cases and is the Only Case that Fails to Give Effect to Clear Restoration Language 35

2. The United States' Contention that Unambiguous Language of Cession and Unconditional Compensation to

the Indians is Required to Find Diminishment is Incorrect and Ignores Contemporaneous Legislation and Congressional Policy 40

3. The United States' Position in this Case is Inconsistent with its Position in Earlier Cases Concerning Diminishment and is Contrary to the Position it Has Previously Taken with Respect to this Reservation 42

II. PETITIONER'S COLLATERAL ESTOPPEL ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT, WERE PREVIOUSLY DISAVOWED BY HIM BEFORE THIS COURT, AND OTHERWISE LACK MERIT .. 45

CONCLUSION 48

APPENDIX:

Appendix A: Presidential Proclamation of September 1, 1906, 34 Stat. 3228 (LD 132) 1a

Appendix B: Map of Uintah and Ouray Reservation 3a

Appendix C: Excerpts from Minutes of Councils Held by James McLaughlin, S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903 (JX 162) 4a

TABLE OF AUTHORITIES

CASES

Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989) 16

Chapoose v. Uintah and Ouray Business Committee, Civ. No. 133-77 (1981) 10

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... passim

Irvine v. California, 347 U.S. 128 (1954) 45

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 21

Mattz v. Arnett, 412 U.S. 481 (1973) 36, 44

National Farmers Union v. Crow Tribe, 468 U.S. 1315 (1984) 16

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 16

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990) 38, 39

Posadas v. National City Bank, 296 U.S. 497 (1936) 26, 27

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) . . . . . passim

Seymour v. Superintendent, 368 U.S. 351 (1962) . . 36, 37

Solem v. Bartlett, 465 U.S. 463 (1984) . . . . . .passim

South Dakota v. Bourland, 508 U.S. ___, 124 L.Ed.2d 606 (1993) 16

Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910) 25

State v. Hagen, 191 Utah Adv. Rep. 26 (Utah 1992) 1

State v. Hagen, 802 P.2d 745 (Utah App. 1990) 3

State v. Perank, 191 Utah Adv. Rep. 5 (Utah 1992) 1

Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957) 13, 14, 42, 43

United States v. Burroughs, 289 U.S. 159 (1932) 26

United States v. Pelican, 232 U.S. 442 (1914) 37

Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D. Utah 1981) 6

Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 479 U.S. 994 (1986) 1

Whiterocks Irr. Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914) 25

STATUTES AND LEGISLATIVE MATERIALS

Act of May 5, 1864, 13 Stat. 63 6

Act of May 24, 1888, 25 Stat. 157 37

Act of May 27, 1902, 32 Stat. 245 . . . . . passim

Act of March 3, 1903, 32 Stat. 982 . . . . . 2, 21, 29

Act of April 21, 1904, 33 Stat. 189 . . . . . 2, 23, 29

Act of March 3, 1905, 33 Stat. 1048 . . . . . .2, 8, 24, 29

Act of January 27, 1906, 34 Stat. 9 12

Act of May 29, 1908, 35 Stat. 460 35

Act of July 20, 1912, 37 Stat. 196 . . . . . 32, 33

Act of March 11, 1948, 62 Stat. 72 9

39 Cong. Rec. 1180 (Jan. 21, 1905) 27

39 Cong. Rec. 1183 (Jan. 21, 1905) 27, 28

39 Cong. Rec. 1863 (1905) 8

74 Cong. Rec. 3408 (1931) 32

General Allotment Act of 1887, ch. 119, 24 Stat. 338 17

H.R. 15331 (1906) 33

H.R. Doc. No. 1279, 60th Cong., 2d Sess. (1909) 32

H.R. Doc. No. 892, 62d Cong., 2d Sess. (1912) 30

H.R. Doc. No. 1250, 63d Cong., 3d Sess. (1914) 30

H.R. Rep. No. 291, 59th Cong., 1st Sess. (1906) 32

H.R. Rep. No. 823 (1906) 33

H.R. Rep. No. 5010, 59th Cong., 1st Sess. (1906) 32

H.R. Rep. No. 943, 62d Cong., 2d Sess. (1912) 32

H.R. Rep. No. 2047, 69th Cong., 2d Sess. (1927) 32

H.R. Rep. No. 370, 77th Cong., 1st Sess. (1941) 32

1934 Indian Reorganization Act, 48 Stat. 984 9

Joint Resolution of June 19, 1902, 32 Stat. 744 2

Joint Resolution 31, 57th Cong. 1st Sess., 32 Stat. 744 (1902) 7, 19

Law and Order Code of the Ute Indian Tribe § 1-2-1 . .16

Law and Order Code of the Ute Indian Tribe § 3-1-1 . . 16

Order Notice, 10 Fed. Reg. 12,409 (1945) 9, 33

Presidential Proclamation of July 14, 1905, 34 Stat. 3119 . . . . . 2, 8, 28, 29

Presidential Proclamation of September 1, 1906, 34 Stat. 3228 . . . . . .2, 5, 30

S. Doc. No. 159, 58th Cong., 3d Sess. (1905) 7, 8

S. Doc. No. 78, 66th Cong., 1st Sess. (1919). . . . 9, 31, 32

S. Rep. No. 139, 59th Cong., 1st Sess. (1906) 32

S. Rep. No. 219, 61st Cong., 2d Sess. (1910) 33

S. Rep. No. 2561 (1906) 33

S. Rep. No. 893, 62d Cong., 2d Sess. (1912) 32

S. Rep. No. 979, 69th Cong., 1st Sess. (1926) 32

Secretarial Order, 36 Fed. Reg. 19920 (1971) 30

18 U.S.C. § 1151 . . . . . 2, 9

28 U.S.C. § 1257 1

OTHER AUTHORITIES

1931 Annual Agency Report 32

1932 Annual Agency Report 32

45 Bureau of Economic & Business Research Report, No. 1 (Univ. of Utah 1985) 10

F. Cohen, Handbook of Federal Indian Law, 34-44 (1982 ed.) 3

Commissioner of Indian Aff. Rept. (1879) 6

David R. Williams, State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?", 1992 B.Y.U. L. Rev. 1247 41

34 I.D. 306 (1905). 26, 32

39 I.D. 79 (1910) 32

59 I.D. 393 (1947) 30

OPINIONS BELOW

The opinion of the Utah Supreme Court in State v. Hagen is reported at 191 Utah Adv. Rep. 26 (Utah 1992) (Joint Appendix ["J.A."]15). The court in Hagen relied on its opinion in the companion case of State v. Perank, 191 Utah Adv. Rep. 5 (Utah 1992) (J.A. 18), and ruled that Myton, Utah, although originally part of the Uintah Valley Reservation, is not presently within the Reservation. The Utah Supreme Court's decisions in Hagen and Perank are in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986) ["Ute Tribe"] (J.A. 88), which held that the original Uintah Valley Reservation exists undiminished, notwithstanding the 1902 Act's restoration of unallotted lands to the public domain.

JURISDICTION

The judgment of the Utah Supreme Court was entered on July 17, 1992. Petitioner filed a timely Petition for a Writ of Certiorari on October 15, 1992, which was granted on April 19, 1993 (J.A. 186). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant statutes and presidential proclamations relating to the Uintah Valley Reservation are set forth below and, except as noted, are reprinted in the Joint Appendix:

Act of May 27, 1902, 32 Stat. 245, 263-64 (J.A. 159).

Joint Resolution of June 19, 1902, 32 Stat. 744 (J.A. 161).

Act of March 3, 1903, 32 Stat. 982, 997-98 (J.A. 163).

Act of April 21, 1904, 33 Stat. 189, 207-08 (J.A. 166).

Act of March 3, 1905, 33 Stat. 1048, 1069-70 (J.A. 166).

Presidential Proclamation of July 14, 1905, 34 Stat. 3119 (J.A. 176).

Presidential Proclamation of September 1, 1906, 34 Stat. 3228 (Appendix A hereto).

STATEMENT OF THE CASE

A. STATE v. HAGEN

Petitioner Robert P. Hagen was charged in state district court with distribution of a controlled substance, a third-degree felony under Utah law (J.A. 4). On August 28, 1989, Hagen pleaded guilty to the charge (R. 33). The offense occurred on non-Indian lands near the town of Myton, Utah. Prior to sentencing, Hagen filed a motion to arrest judgment claiming that he was an Indian and, because Myton was within an Indian reservation, the state court lacked jurisdiction (J.A. 8). See 18 U.S.C. § 1151.

The trial court denied the motion and retained jurisdiction (J.A. 9-10). On appeal, the Utah Court of Appeals reversed and, relying on the *en banc* decision of the Tenth Circuit Court of Appeals in Ute Tribe (J.A. 88), held that Petitioner was an Indian, that Myton was within the Uintah Valley Reservation, and that the State of Utah lacked criminal jurisdiction over the Petitioner. State v. Hagen, 802 P.2d 745 (Utah App. 1990).

The Utah Supreme Court granted the State's Petition for a Writ of Certiorari (J.A. 14) and, on July 17, 1992, issued its decision reversing the Utah Court of Appeals. Based on its decision the same day in State v. Perank, the Utah Supreme Court disagreed with the Tenth Circuit Court's decision in Ute Tribe and held that the 1902 Act restored the unallotted lands to the public domain and diminished the Uintah Valley Reservation, that the town of Myton was not part of the Uintah Valley Reservation and was not in "Indian country,"[1] and that the state court had criminal jurisdiction over Hagen (J.A. 15-16).[2]

---

[1] The terms "Indian country" and "Indian reservation" are often used interchangeably, and refer to the area--regardless of land ownership--within the boundaries of an Indian reservation. The term "trust lands" refers to lands held in trust by the United States for the exclusive use and occupation of Indians or Indian tribes. See generally F. Cohen, Handbook of Federal Indian Law, 34-44 (1982 ed.). Thus, Indian country or an Indian reservation--with attendant jurisdictional ramifications--can, depending on the situation, include non-Indian land located within the boundaries of a reservation.

[2] The parties in Hagen and Perank have stipulated that, for purposes of determining whether the crimes occurred within Indian country, the record before the federal court in Ute Tribe may be considered. Brief of Respondent State of Utah in Support of Petition for a Writ of Certiorari (App. E 163a-64a). Consequently, all subse-

This Court granted Hagen's timely Petition for a Writ of Certiorari on April 19, 1993 (J.A. 186).

B. STATE v. PERANK

State v. Perank is the companion case to, and was decided on the same day as, Hagen. The opinion in Perank (J.A. 18) provides the detailed analysis by the Utah Supreme Court about the diminishment of the Uintah Valley Reservation and was cited by that court as controlling authority in Hagen. The Perank case was under advisement at the time the Hagen case reached the Utah Supreme Court.

Perank, like Hagen, pleaded guilty to a felony criminal charge for an offense in the town of Myton, Utah. Like Hagen, Perank later asserted that the state district court lacked jurisdiction over him because he was a Ute Indian and the crime took place within the original boundaries of the Uintah Valley Reservation. Perank relied solely on the *en banc* decision of the Tenth Circuit Court in Ute Tribe (J.A. 88) for the proposition that the original boundaries of the Uintah Valley Reservation were not diminished by the Act of May 27, 1902, 32 Stat. 245, 263-64 ["the 1902 Act"] (J.A. 159). The state district court rejected those claims and imposed Perank's prison sentence. The Utah Supreme Court affirmed (J.A. 74-75).

---

quent record citations in this brief will be to that federal court record: JX refers to Joint Exhibits and LD refers to the Joint Compendium of Legislative Documents.

C. OVERVIEW OF THE AREA IN DISPUTE AND THE STATUTE RESTORING THE LANDS TO THE PUBLIC DOMAIN

1. The Disputed Lands Do Not Involve Tribally-Owned Trust Lands

The jurisdictional boundaries of the Uintah Valley Reservation have been the subject of litigation, uncertainty, and conflict for more than fifteen years. While this case presents the question of whether the State of Utah has criminal jurisdiction over Petitioner Hagen, the boundary dispute and its overall jurisdictional ramifications transcend the particular issue affecting Hagen.

The Ute Indian Tribe is a federally-recognized Indian tribe, comprised of the Uintah, White River, and Uncompahgre Bands. There are today approximately 3,000 enrolled members of the Tribe, nearly all of whom live on "trust lands" in the Uinta Basin of northeastern Utah. Ute Tribe, J.A. 130 (Seth, J., dissenting). Trust lands are lands held by the United States for the exclusive use and occupation of Indians or Indian tribes. The dispute in this case does not concern these trust lands, comprising approximately 1.1 million acres in a relatively contiguous block. Rather, the dispute here concerns an area of approximately 400,000 acres that was within the boundaries of the Reservation when created, but was opened for settlement in 1905 pursuant to the 1902 Act, as amended. The disputed area is referred to generally as the "unallotted lands" (lands not allotted to the Indians or reserved for tribal grazing) or as "non-trust lands." Nearly all of the disputed area lies within Duchesne and Uintah Counties.

The town of Myton--where Petitioner Hagen's crime occurred--is situated on non-trust land.[3] It must therefore be determined whether the 1902 Act, as amended and supplemented by the subsequent Indian Appropriations Acts of 1903, 1904 and 1905, diminished the original reservation boundaries or left them intact.

2. The Act of May 27, 1902, as Amended, Provides a Comprehensive and Detailed Scheme for Opening the Reservation and Restoring the Surplus Lands to the Public Domain

The original Uintah Valley Reservation, as created by Executive Order and confirmed by Congress in the 1860's,[4] consisted of more than two million acres, most of which are located in Duchesne County.[5] On May 27, 1902, Congress passed an Indian Appropriations Act ["the 1902 Act"] (J.A. 159), which was a complete plan for opening the Uintah Valley Reservation. Allotments of separate tracts of land were to be made to tribal members before October 1, 1903, and all the unallotted lands of the original Uintah Valley Reservation would then be "restored to the public domain" and opened for public settlement, with homesteaders paying $1.25 per acre. Revenues from the sale of the opened lands were to be used for the benefit of the Indians.

On June 19, 1902, shortly after the enactment of the 1902 Act, Congress passed a Joint Resolution establishing a tribal grazing reserve. The Joint Resolution also provided that certain allotments of the Uintah Valley Reservation would be to made the Uncompahgre Indians. J. Res. 31, 57th Cong. 1st Sess., 32 Stat. 744, 745 (1902) (J.A. 161). This Resolution affirms that, after the allotments were made and the grazing reserve established, the surplus lands would be "restored to the public domain."

The actual opening of the Reservation was delayed by three subsequent amendments to the 1902 Act, i.e., the 1903, 1904, and 1905 Indian Appropriations Acts. These amendments extended the period for opening the Reservation to allow the Department of the Interior to complete the required surveying. See, e.g., S. Doc. No. 159, 58th Cong., 3d Sess. 3 (1905) (LD 101). The first amendment to the 1902 Act--the 1903 Indian Appropriations Act (J.A. 163), reaffirmed that the restoration language of the 1902 Act remain unchanged (J.A. 164). The 1903 Act also dispensed with any requirement for consent of the Tribe to the opening; thereafter, consent was limited to the taking of allotments (J.A. 164). The 1904 Act, enacted expressly to carry out the purposes of the 1902 Act, extended the opening date to March 10, 1905, so necessary surveying

---

[3] A copy of a map (part of Exhibit I-1B) illustrating the original Uintah Valley Reservation's boundaries and the general land ownership within those areas is attached as Appendix B and was part of the trial record in Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D. Utah 1981).

[4] The Uintah Valley Reservation was not originally created for the Utes. The Act of May 5, 1864, 13 Stat. 63 (LD 4) set apart the Uintah Valley Reservation "for permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same."

[5] See Executive Order of Oct. 3, 1861 (I Kappler 900); Act of May 5, 1864, 13 Stat. 63; [1879] Commissioner of Indian Aff. Rept. at 331 (JX 3). The westernmost part of the original Reservation is in Wasatch County, and the easternmost part is in Uintah County.

could be completed. This 1904 amendment left unchanged the 1902 Act language restoring the unallotted lands to the public domain (J.A. 166).

The last amendment to the 1902 Act occurred in the 1905 Indian Appropriations Act (J.A. 166-70). When the Department of the Interior still had not been able to complete the surveys necessary to make the allotments, the Senate, on February 4, 1905, demanded an explanation from the Secretary of the Interior as to why he was not going to meet the March 10 deadline. 39 Cong. Rec. 1863 (1905) (LD 103). The Secretary promptly responded, explaining numerous difficulties, including uncertain funding for surveyors, had prevented timely completion of the allotment program. He made clear the need for an extension of time in which to finalize it. S. Doc. No. 159, 58th Cong., 3d Sess. 2-4 (1905) (LD 101 at 2-4). Accordingly, Congress extended the time for opening the Reservation, to September 1, 1905.

The 1905 Act also specified "the manner" by which the Reservation would be opened. Act of March 3, 1905, 33 Stat. 1048, 1069-70 (J.A. 166). Finally, it granted the President additional authority to set aside reservation lands for other particular federal uses. Except for some specific exceptions not relevant here, the 1905 Act did not change the baseline purpose of the 1902 Act, and the operative provisions of the 1902 Act remained in full force and effect. Thus, President Roosevelt's July 14, 1905 Proclamation opening the Reservation, 34 Stat. 3119 (J.A. 176), refers specifically to the 1902 Act and repeats its restoration language (J.A. 176-77).

3. State and Local Officials Have Historically Treated the Unallotted Lands as Within Their Jurisdiction

After 1905--and for the next forty years--the tribal grazing reserve and the allotted lands in the original Uintah Valley Reservation were treated as the Ute Indians' existing reservation.[6] On August 25, 1945, a 217,000-acre tract of opened but undisposed-of land located within what had been part of the original Uintah Valley Reservation was also restored to tribal ownership and "added to and made a part of the existing reservation" by the Secretary of the Interior pursuant to Sections 3 and 7 of the 1934 Indian Reorganization Act, 48 Stat. 984. 10 Fed. Reg. 12,409 (1945) (LD 183); Perank, J.A. 67. Later, the Act of March 11, 1948, 62 Stat. 72, added to the then-existing Reservation an additional 500,000 acres within the former Uncompahgre Reservation (the so-called "Hill Creek Extension").

There is no dispute that the tribal reserves and the remaining allotments, some 360,000 acres, are "Indian country" within the meaning of 18 U.S.C. §§ 1151(a) and (c). Nor does anyone question that the surplus lands restored to tribal ownership and reservation status in 1945 and 1948, which total more than 700,000 acres, are also Indian country.[7] The dispute here involves the approxi-

---

[6] See Ute Tribe, J.A. 130-31 (Seth, J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919) (letter of the Secretary of the Interior); note 27, infra.

[7] Approximately half of the trust lands lie within the boundaries of the original Uintah Valley Reservation, while the other half lies within the original Uncompahgre Reservation.

mately 400,000 acres of non-trust lands that were restored to the public domain and opened to settlement by the 1902 Act, as amended.[8]

Historically, the disputed area has been the concern of the state and local governments. Roughly 18,000 non-Indians and 300 Indians reside in the disputed area. Since nearly all of the approximately 3,000 enrolled members of the Tribe[9] live on trust lands, the population and land ownership of the disputed area are more than ninety percent non-Indian.[10] Ute Tribe, J.A. 130-31 (Seth, J., dissenting). Within the disputed area (the non-trust lands), there are several incorporated towns and cities (such as Myton, Roosevelt, and Duchesne) and, over the years, there has been significant natural resource, business, and recreational development by non-Indians. Thus, the area in dispute in this case is land over which the State of Utah and its political subdivisions have asserted jurisdiction for seventy years.

---

[8] If one includes the U.S. Forest Service lands set apart in 1905, the non-Indian acreage within the original Uintah Valley Reservation's boundaries is approximately 1.7 million acres. See Map, Appendix B hereto (J.A. 185).

[9] Ute Tribe, J.A. 130-31 (Seth, J., dissenting); Bureau of Economic & Business Research Report, Univ. of Utah, Vol. 45, No. 1, at 8, Table 5, July 1, 1984 (1985). In Ute Tribe and Perank, tribal membership is listed as between 1,500 and 1,800. However, a tribal court decision in 1981 allowed several hundred additional individuals to be enrolled. See Chapoose v. Uintah and Ouray Business Committee, Civ. No. 133-77 (1981). See also Perank, J.A. 26.

[10] The seat of tribal government is at Fort Duchesne (not to be confused with the City of Duchesne) on undisputed trust lands.

SUMMARY OF ARGUMENT

When asked to determine whether a particular surplus lands act diminished an Indian reservation or simply allowed non-Indians the opportunity to settle on lands within existing reservations, this Court has determined congressional intent by looking at the language of the specific act and the act's historical context. Solem v. Bartlett, 465 U.S. 463, 468-70 (1984). Although language is considered most probative, this Court has also considered the subsequent treatment of the lands by federal, state, and local governments. Finally, this Court has looked at the jurisdictional history of the opened lands, or whether the reservation has "lost its Indian character." Id. at 470-72; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977).

In this case, the facts relevant to each of these inquiries support the conclusion that Congress intended to diminish the Uintah Valley Reservation--an understanding that history reveals was shared by the Ute Indians and local government officials until recent times. First, the disputed area "lost its Indian character" long ago. Until recently, the state and local governments have asserted jurisdiction over the disputed area without challenge from the Indians, who have minimal, if any, interests in the disputed area. The Ute Tribe has over one million acres on which the majority of the tribal members reside and on which the tribal seat of government is located. In contrast, the residents of the disputed area settled on the opened lands with the understanding that they were outside the Reservation boundaries. This understanding, which has been shared by the Ute Tribe since 1905,

continued undisturbed until litigation in the Ute Tribe case began in 1975.

Second, the language of the 1902 Act is unambiguous --all unallotted lands are "restored to the public domain." The amendments to the 1902 Act do not repeal or in any way alter this language. The United States' assertion that the 1905 Act, which only extended the opening date of the Reservation and provided for the manner of opening, totally superseded the 1902 Act cannot be supported. Indeed, if the 1902 Act were replaced, why would the 1905 Presidential Proclamation opening the Reservation specifically refer to the 1902 Act and incorporate its restoration language? Even more significantly, if the United States' position were accepted, there would have been no congressional authorization for the Indian allotments, for the tribal grazing reserve, or for payment of the proceeds to the Indians. Provisions such as these, which were essential to the opening of the lands for settlement, are found only in the 1902 Act and its amendments.

Third, both executive and legislative actions after 1905 dealing with the Reservation are based on the premise that the restoration language of the 1902 Act diminished the Reservation's boundaries. For example, the Act of January 27, 1906, 34 Stat. 9, extending the time for homesteaders to establish residence on the opened lands, refers to the unallotted lands as land "formerly part" of the Reservation.

Fourth, in prior proceedings concerning the Reservation boundaries, both the Ute Tribe and the United States have conceded that the 1902 Act restored the unallotted

lands to the public domain. For example, in Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957), the parties stipulated that the Indians received allotments pursuant to the 1902 Act, as amended, and that the surplus lands were "restored to the public domain" under the terms of that Act.

Finally, Petitioner Hagen's collateral estoppel arguments are not properly before this Court, were disavowed by Hagen during the certiorari process, and otherwise lack merit.

For these reasons, the judgment of the Utah Supreme Court should be affirmed.

ARGUMENT

I. THE ACT OF 1902, AS AMENDED, RESTORED THE UNALLOTTED LANDS TO THE PUBLIC DOMAIN AND DIMINISHED THE UINTAH VALLEY RESERVATION

A. THE LANGUAGE OF THE 1902 ACT AND ITS AMENDMENTS, VIEWED IN THE CONTEXT OF THEIR PASSAGE AND SUBSEQUENT EVENTS, CONFIRMS CONGRESSIONAL INTENT TO DIMINISH THE UINTAH VALLEY RESERVATION

1. The Disputed Area Lost its Indian Character Long Ago, and Leaving the Original Uintah Valley Reservation Boundary Intact Will Not Materially Advance the Interests of Tribal Sovereignty, But Will Severely Hamper the Functioning of State and Local Governments

The language of a statute is generally the first and most important element in determining congressional intent. However, in this case it is helpful to begin the analysis by looking at the character of the disputed lands after they were opened for settlement in 1905. As this Court recognized in Solem, when the area involved "has long since lost its Indian character, we have acknowledged that de facto if not de jure diminishment may have occurred." Id. at 471. Thus "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation . . . ." Id. As this Court stated in Rosebud,

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts.

Rosebud, 430 U.S. at 604-05 (emphasis added).[11]

The disputed area in this case "lost its Indian character" long ago. Of the roughly 18,000 people living there, approximately 300 are Indians. Nearly all of the other tribal members live on "trust lands." Ute Tribe, J.A. 130-31 (Seth, J., dissenting). Virtually all of the disputed area consists of private, state, and federal property. See Map, Appendix B (J.A. 185). This compares to the current undisputed tribal trust lands of over one million acres, which includes allotments, the grazing reserve, and lands subsequently restored to the Tribe. The seat of tribal government is located on undisputed trust lands at Fort Duchesne and most, if not all, tribal business enterprises are conducted on trust lands.[12]

The 18,000 non-Indians residing in the disputed area are the persons "who actually moved onto the reservation lands" and have been there ever since. It is their "justifiable expectations," built up over a seventy-year period, that would be upset under the position urged by Petitioner

---

[11] The United States has taken the position that presidential proclamations opening various reservations are important "because [they were] the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian Reservation." Brief for the United States as *Amicus Curiae* at 22, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500). In Respondent's view such presidential proclamations are, therefore, one clear source of such "justifiable expectations."

[12] The demographics in Solem, which held that the reservation was undiminished, were the reverse. Two-thirds of the tribal members lived in the disputed area and the seat of tribal government was located there. Solem, 465 U.S. at 480.

and the United States here and adopted in Ute Tribe. And it is their interests that the Tenth Circuit ignored in spite of this Court's holdings that such factors should be taken into account. See, e.g., Solem, 465 U.S. at 471-72; Rosebud, 430 U.S. at 604-05. If Petitioner prevails, these 18,000 non-Indians and their property arguably would be subject to regulation by the tribal government, a government in which they would have no elective voice. Although the Tribe would not have criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the same cannot be said for civil jurisdiction, particularly with regard to suits in tribal court.[13]

If the original Reservation boundaries are left intact, the practical result would be that the Ute Tribe would preside over an area owned and predominantly populated by non-Indians and in which the Tribe has little presence and no real interest as a sovereign. At the same time, state and local authority would be significantly limited

---

[13] See National Farmers Union v. Crow Tribe, 468 U.S. 1315 (1984). Respondent is well aware that recent decisions of this Court have somewhat limited tribal jurisdiction over non-Indians. E.g., Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 508 U.S. ___, 124 L.Ed.2d 606 (1993). However, the exact limits of tribal sovereignty over non-Indians remain undecided. This is particularly true in view of the fact that the Ute Tribe has enacted a comprehensive Law and Order Code (R. Ex. I-20) which, by its own terms, applies to Indians and non-Indians alike within the original Reservation boundaries in a variety of contexts. See Law and Order Code of the Ute Indian Tribe § 1-2-1. Despite the Tribe's assertions to the contrary, Section 3-1-1 et seq. of the Tribal Code comprehensively authorizes exclusion and removal of certain non-Indians. Under these provisions, if Petitioner prevails the Tribe could arguably remove a non-Indian with tuberculosis who was visiting relatives in the town of Myton.

despite the fact that this area has principally been the concern and responsibility of these governments, not the Tribe. In contrast, the result reached by the Utah Supreme Court in Perank would have few, if any, adverse effects on tribal self-government or regulation by the Tribe over its members because the tribal seat of government and most tribal members are on the over one million acres of undisputed trust lands.[14]

Respondent recognizes that the treatment of the disputed area is not, standing alone, dispositive of this Court's inquiry on diminishment. However, these important demographic factors, coupled with the language of the 1902 Act and the context in which it was passed, compels the conclusion reached by the Utah Supreme Court that the Reservation was diminished.

2. The Operative Language of the 1902 Act--"Restored to the Public Domain"--Evidences Congressional Intent to Diminish the Uintah Valley Reservation

The historical context of the May 27, 1902 Act, which opened the Uintah Valley Reservation, begins with the General Allotment Act of 1887, ch. 119, 24 Stat. 338. The 1887 Act authorized the President to allot parcels of reservation lands to individual Indians and to open surplus lands to non-Indian settlement. Two primary forces drove the General Allotment Act: first, an increasing demand

---

[14] For a more detailed discussion of the demographics of the area, Respondent refers the Court to the Brief of Roosevelt City, Utah, as *Amicus Curiae* in Support of Respondent.

for new lands for settlement in the West and, second, implementation of congressional policy to assimilate the Indians into white society and terminate their dependent status. Solem v. Bartlett, 465 U.S. 463, 466-67 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 590 (1977).

Even though Congress anticipated that the General Allotment Act process would lead to the eventual demise of the reservation system, this Court has not found this policy determinative of Congress's intent with respect to a particular surplus lands act. Solem, 465 U.S. at 468-69, 472; Rosebud, 430 U.S. at 586. Since each act employed its own statutory language and was "the product of a unique set of tribal negotiation and legislative compromise," this Court has examined each surplus land act on a case-by-case basis to ascertain whether Congress intended to diminish a particular reservation. Solem, 465 U.S. at 467.

The unambiguous operative language of the 1902 Act restores the unallotted lands to the public domain. In 1902, the Uintah Valley Reservation contained vast areas of land in excess of the lands necessary to satisfy the allotments and grazing needs of the Indians. As a result, the 1902 Act includes in its operative section a provision restoring to the public domain any lands not allotted to the Indians--language that clearly evidences an intent to diminish:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be

> allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain.

Act of May 27, 1902, 32 Stat. 245, 263-64 (J.A. 159-60) (emphasis added).

Consistent with this operative clause, language evidencing Congress's intent to diminish the Reservation continues in the 1902 Act's secondary provisions. For example, the Act sets a price of $1.25 per acre for the unallotted lands opened for settlement and allocates the proceeds from the "sale of the lands so restored to the public domain" to the Ute Indians (J.A. 159-60) (emphasis added).

A related Joint Resolution, issued by Congress shortly after the 1902 Act's passage, confirms Congress's intent to restore the surplus lands to the public domain after the allotments were made and the grazing reserve established. The Resolution directs the Secretary of the Interior to establish a tribal grazing reserve and provides for certain allotments within the Uintah Valley Reservation to be made to Uncompahgre Utes. J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902). The final paragraph of the Joint Resolution (J.A. 163) clearly demonstrates Congress's intent to restore the surplus lands to the public domain:

> The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

(J.A. 163).

3. The 1903 Act, Which Amended the 1902 Act and Eliminated the Requirement that the Indians Consent to Opening the Reservation, Confirms Congress's Intent to Diminish the Reservation

The 1902 Act was amended three times--in 1903, 1904, and 1905. Each amendment extended the opening date for the Reservation and made other changes to specific provisions of the Act. None of the amendments repealed or in any way affected the operative provision of the 1902 Act restoring the unallotted lands to the public domain. Nor did any of the amendments retreat from Congress's "baseline purpose" to diminish the reservation. See Rosebud, 430 U.S. at 592.

The 1903 Act is pivotal in the Uintah Valley Reservation's opening process because it provided for substantive changes that confirm Congress's continuing intent to diminish the Reservation. First, the 1903 Act stated that

its purpose was to carry out the purposes of the 1902 Act, thus reaffirming Congress's intent to restore the surplus lands to the public domain. Second, it provided that an Indian inspector be sent to obtain the consent of the Utes --not to the opening of the Reservation, but to their individual allotments. Third, the Act provided that, if the Indians' consent to choose their own allotments could not be obtained, the Secretary would assign allotments to them and the Reservation would be opened under the provisions of the 1902 Act, with the opening date postponed to October 1, 1904. Act of March 3, 1903, 32 Stat. 982, 997-98 (J.A. 163).

The consent provision in the 1902 Act relied on so heavily by Hagen and the Ute Tribe was changed significantly and substantively by the 1903 Act. Congress specifically eliminated the consent requirement after this Court held that the United States Government had plenary power to deal with reservation lands and that the Indians' consent to opening a reservation was not required. Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903). Only sixteen years ago, this Court specifically relied on Lone Wolf in holding that the absence of Indian consent did not defeat congressional intent to diminish a reservation. Rosebud, 430 U.S. at 587-88. Thus, because the consent of the Indians to the opening was no longer required, the 1903 Act only provided the Indians the option of choosing their own allotments or having the allotments chosen for them.

In accordance with the directives of the 1903 Act, Indian Inspector James McLaughlin (the same experienced inspector who negotiated the Rosebud agreement) met with the Utes over a period of six days to explain the

effect of the 1903 Act.[15] The following brief extracts from the transcripts of those meetings demonstrate McLaughlin's clear understanding of Congress's intent to extinguish the Reservation boundaries without the Indians' consent after the 1903 Act:

> My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation.
>
> . . . .
>
> The question of opening the reservation is not with you; that has been determined by the act of congress . . . . We want to discontinue useless discussion as to the opening of the reservation
>
> . . . .
>
> . . . .
>
> My friends, I have no doubt but that if you were in Washington two years ago the officials of the Department may have told you that your claim to this reservation was good. That was before the decision of the Supreme court of five months ago [Lone Wolf] which I have told you of, since which decision the policy of consulting Indians in regard to opening their reservations has changed. My friends, Congress has passed a law opening your reservation and the president has consented to it by signing the Act. Under that act you may consent to take allotments of your own selections and if you refuse they will be arbitrarily allotted to you, and in addition to your individual allotments 250,000 acres will be set apart for your common grazing grounds. That will be done on or before a year from the first day of next October and your surplus land will be thrown open for settlement on that date.

(JX 162 at 42-45) (emphasis added).

As noted above, the 1904 amendment of the 1902 Act again postponed the opening date of the Reservation, to March 10, 1905. Act of April 21, 1904, 33 Stat. 189, 207-08 (J.A. 166). The 1904 Act was expressly enacted to carry out the purposes of the 1902 Act, and it made no change in the prior statutory language showing congressional intent to restore the unallotted lands to the public domain. Id.

4. The 1905 Act Cannot be Read Apart from the 1902 Act It Amends

The 1905 Act was the last Indian Appropriations Act amending the 1902 Act (J.A. 166). It cannot--as Petitioner, the United States, and the Ute Tribe contend--be read apart from the 1902 Act it amends. To do so ignores the clear language of both acts. Further, as a practical matter,

---

[15] A more complete compilation of relevant portions of the McLaughlin transcripts is attached hereto as Appendix C. McLaughlin was the designated representative of the United States to negotiate with the Utes.

sole reliance on the 1905 Act would have made the opening as it occurred impossible because that Act did not include key provisions contained in the prior Acts.

On its face, the 1905 Act does not contain any language expressly repealing the 1902 Act or any of the subsequent amendments to that Act. Nor does the 1905 Act indicate a retreat from the "baseline intent" of Congress to restore the surplus lands to the public domain. The 1905 Act does extend the opening date and specify "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. at 1069 (J.A. 167) (emphasis added). The 1905 Act provides procedures for accomplishing an orderly settlement of the lands opened by the 1902 Act. For example, it provides that the unallotted lands be disposed of under "the general provisions of the homestead and town-site laws" and opens them to settlement and entry "by proclamation of the President." It also repeals a specific, but minor, part of the 1903 Act dealing with the location of the grazing reserve. These amendments to the 1902 Act, however, were done with "surgical precision." Perank, J.A. 55. The Utah Supreme Court correctly summed up the relationship between the relevant enactments:

> We conclude that the 1902 Act established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation. The congressional intent to diminish, as well as other essential aspects of the opening of the Reservation that were established by the 1902 Act, remained in full force and effect through the enactment of the 1902 Joint Resolution and the 1903, 1904, and 1905 Acts. The 1902 Act established more than a "baseline purpose" of restoring unallotted, unreserved lands to the public domain. See Rosebud, 430 U.S. at 592. The [1902] Act, on its face, provided for the opening of the Uintah Reservation. In short, the restoration language of the 1902 Act was operative statutory language when the opening finally occurred in 1905.

Id., J.A. 57 (emphasis added).[16] Accord Ute Tribe, J.A. 146-49 (Seth, J., dissenting).

If the 1905 Act is interpreted as totally supplanting the 1902 Act, as decided by the Tenth Circuit *en banc* and as urged by Hagen, the United States, and the Ute Tribe, many essential terms and conditions for the opening of the Reservation would not be addressed. For example, the 1902 Act, not the 1905 Act, provided for allotments to the individual Indians. The 1902 Act, not the 1905 Act, fixed the price to be paid by non-Indian settlers and provided how the proceeds from the sale of the surplus lands were to be used for the Indians' benefit. See Perank, J.A. 56-57.

This point is illustrated in a letter from the Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated September 28, 1922 (JX 403 at 2).

---

[16] Shortly after the opening of the Reservation, the Utah Supreme Court "judicially noticed" that the surplus lands had been restored to the public domain pursuant to the 1902 Act. See Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910); Whiterocks Irr. Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914).

Since the 1905 Act did not specify the price to be paid by settlers, as did the 1902 Act, the Commissioner of Indian Affairs queried whether Congress intended that no price be paid. The question was specifically stated in terms of "whether the [1905 Act] repealed and superseded the [1902 Act]." The Lands Commissioner emphatically answered that "such was not the intention of Congress but that homestead entries . . . should be . . . made subject to the payment required by [the 1902 Act]." The letter specifically referred to a 1905 Interior Department Opinion, which stated, "[I]t was the opinion of this Department that the condition exacting payment of homesteaders found in the Act of 1902 was not repealed by its omission from the Act of 1905, thus preserving the fund created under the Act of 1902 . . . ." 34 I.D. 306, 311 (1905) (emphasis added).

We cannot now, in 1993, read the 1905 Act to include only certain provisions of the 1902 Act--such as those regarding making the allotments, compensating the Indians, and providing for grazing rights--and at the same time selectively exclude from that reading the operative language of the 1902 Act restoring the surplus lands to the public domain. To do so would be to "remake history," which this Court has admonished cannot be done. Rosebud, 430 U.S. at 615.[17]

---

[17] This Court has long disfavored implied repeals. Posadas v. National City Bank, 296 U.S. 497, 503 (1936). In fact, the Court has held that "[i]mplied repeals are not favored, and if effect can reasonably be given to both statutes the presumption is that the earlier is intended to remain in force." United States v. Burroughs, 289 U.S. 159, 164 (1932). Effect can reasonably be given to both the 1902 Act and the 1905 Act. The 1902 Act diminished the reservation by restoring the unallotted lands to the public domain and the 1905 Act outlined a method of disposing of those lands restored to the public domain. A subsequent statute does not implicitly repeal an earlier one if the subsequent statute is "merely affirmative, or cumulative, or auxiliary." Posadas, 296 U.S. at 504. The 1905 Act is indeed a cumulative and auxiliary piece of legislation regarding the opening of the Uintah Valley Reservation.

Just as there is no language in the 1905 Act repudiating the operative language of the 1902 Act, there is no indication in the legislative history of the 1905 Act that it replaced the 1902 Act or that Congress intended to retreat from the "baseline purpose" of the 1902 Act to restore the surplus lands to the public domain. In 1905, Congress wanted a speedy conclusion to the Uintah Valley allotment process, but it was equally concerned that a land rush by speculators would deprive bona fide homesteaders of the surplus lands. Congress addressed this concern, voiced in both the House and the Senate, by opening the surplus lands under the homestead and townsite laws so the lands would not fall prey to speculators. 39 Cong. Rec. 1180-82 (Jan. 21, 1905) (LD 103); Hearings, Subcomm., Senate Comm. of Indian Affairs, 58th Cong., 3d Sess. (1905) (LD 100 at 30). Thus, the 1905 Act restricted the methods of entry and settlement of the surplus lands, patterning them after the scheme used in the opening of the Rosebud Reservation. 39 Cong. Rec. 1183 (Jan. 21, 1905) (LD 103).[18]

---

[18] This is demonstrated by the following exchange between Representatives Sherman and Stephens in the House debate:

> Mr. SHERMAN. This amendment under consideration proposes to open them under a proclamation by the President, which shall lay down rules and regulations for their opening, the idea being to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation

5. The Presidential Proclamation of July 14, 1905, Opening the Reservation, Confirms that the 1902 Act Was Controlling

In extending the opening date for the Reservation, the 1905 Act authorized the President to open the Reservation prior to September 1, 1905. President Roosevelt opened the Reservation on July 14, 1905. 34 Stat. 3119 (J.A. 176). The Presidential Proclamation expressly recognized the operative effect of the 1902 Act and its "restore to public domain" language. It also expressly acknowledged that the 1903, 1904, and 1905 Acts amended the 1902 Act, leaving the operative language and intent of the 1902 Act intact. The Proclamation provided, in pertinent part:

> Whereas it was provided by the Act of Congress, approved May 27, . . . 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation . . . "shall be restored to the public domain . . . ."

---

opening and have been used as the rules and regulations in the opening up of the Indian lands for the last two or three years, and which have proven to be not only beneficial to the Indians, but of advantage to the would-be settlers.

Mr. STEPHENS of Texas. And that is the object of the amendment?

Mr. SHERMAN. Yes, sir.

39 Cong. Rec. 1183 (Jan. 21, 1905) (LD 103).

> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> [The Act is here quoted in full.]
>
> Now, therefore, I . . . do hereby declare . . . that all the unallotted lands in said reservation, excepting such as have at that time been reserved . . . will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States . . . .

34 Stat. at 3119-20 (J.A. 176-78).

The Court in Rosebud placed strong emphasis on the Presidential Proclamation opening that reservation, noting that the executive branch clearly understood that the acts in question "contemplated a diminution of the Reservation." Rosebud, 430 U.S. at 602. The 1905 Uintah Proclamation is similar to the one involved in Rosebud. It constitutes an "unambiguous, contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment" and unmistakably reflects the intent of

Congress. See Rosebud, 430 U.S. at 602-03; accord Perank, J.A. 60.[19]

The 1905 Presidential Proclamation does not stand alone in its understanding that the surplus lands were restored to the public domain.[20] In addition, the subsequent Presidential Proclamation of September 1, 1906, 34 Stat. 3228 (Appendix A hereto) (LD 132) again confirms Congress's intent to restore the unallotted lands to the public domain and diminish the Reservation under the 1902 Act, as amended. See Perank, J.A. 60-61. The purpose of the 1906 Proclamation was to deal with a homestead entry that had mistakenly been filed on a small

[19] Despite the efforts of the United States to downplay the presidential proclamations in this case, it has historically taken the position that such proclamations are very important. See, e.g., Brief for United States as *Amicus Curiae* at 22, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500) ("[T]he most important administrative interpretation of the 1891 Act is the contemporaneous [presidential] proclamation opening the Reservation for settlement.")

[20] The supportive legislative, executive, and historical documents in the record are voluminous. See, e.g., Letter of the Acting Commissioner of Indian Affairs to the Secretary of Interior, May 11, 1905, at 3 (JX 263); H.R. Doc. No. 892, 62d Cong., 2d Sess. 1-2 (1912) (Joint Report of Inspector James McLaughlin and the Chief Supervisor) (LD 146); H.R. Doc. No. 1250, 63d Cong., 3d Sess. 1-2 (1914) (Letter of the Secretary) (LD 149); Solicitor Opinion M-33626, at 2 (August 3, 1944); 59 I.D. 393 (1947); Solicitor Opinion M-36051, at 1-2, 5 (December 7, 1950); Secretarial Order, 36 Fed. Reg. 19920 (1971) (LD 210).

Although a few documents in the vast historical record may indicate non-diminishment, Respondent State of Utah disagrees with the United States that all subsequent legislative and historical documents "contribute nothing of substance to the decision of this case." Brief for United States as *Amicus Curiae* at 27.

portion of the tribal grazing reserve. The 1906 Proclamation adopted basically the same construction of the opening acts as the 1905 Proclamation. Further, and more importantly, it recognized that the Reservation boundaries had been diminished by referring to the "former Uintah Indian Reservation," and by restoring the small homestead tract located on the grazing reserve "to the public domain" so that it would be subject to entry. "Had the surplus reservation lands not been restored to the public domain by the 1902 Act, it would have been pointless to transfer the parcel from the grazing reserve to the public domain." Perank, J.A. 60.

Until recent years, the understanding of other responsible government officials consistently mirrored President Roosevelt's construction.[21] For decades after the opening, Interior officials consistently administered only the trust lands (the tribal grazing reserve, the allotments, and the lands later restored to tribal ownership and Reservation status) as the Tribe's existing Reservation. The response of the Secretary of the Interior in 1919 to a Senate Resolution requesting information concerning the Indians in Duchesne and Uintah Counties is telling. The Secretary stated that the Uintah Indian Reservation "comprises 291,141.65 acres," S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919), which is, essentially, the area of the tribal grazing reserve.

Another example is a 1941 memorandum from Secretary of the Interior H. Ickes as part of a House Report dealing with the Uintah Irrigation Project. Secretary Ickes stated that "[t]he original area of the

[21] See Perank, J.A. 64; Ute Tribe, J.A. 151-52 (Seth, J., dissenting).

reservation was approximately 2,039,040 acres. Cessions were made . . . at various times so that at present the reservation embraces but 366,000 acres or less than one-fifth of the original." H.R. Rep. No. 370, 77th Cong., 1st Sess. (1941) (LD 179).

These tabulations of acreage may not be completely accurate; however, they show that subsequent Secretaries of the Interior (and everyone else)[22] well understood that the original Reservation had been diminished, and--as late as 1941--consisted of only one-fifth of its original acreage.

Succeeding legislation and other congressional materials are to the same effect.[23] Numerous congressional documents subsequent to the 1905 opening contain references to the "former" Reservation. See, e.g., S. Rep. No. 219, 61st Cong., 2d Sess. (1910) (LD 138) (entitled "Making Available Certain Lands on Former Uintah Indian Reservation").[24]

The Secretarial Order of Restoration in 1945 is also instructive. That Order not only restored 217,000 acres of unsold surplus lands to tribal ownership, but stated that they were "added to and made a part of the existing reservation." Order Notice, 10 Fed. Reg. 12,409 (1945).[25] See also Ute Tribe, J.A. 151 (Seth, J., dissenting). Had the Reservation boundaries survived the 1905 opening, there would have been no point in making those unsold surplus lands "part of the existing reservation," since they were already within the original exterior boundaries.[26]

---

[22] See 1929 Annual Report of the Uintah & Ouray Agency, at 1 ("The present Uintah and Ouray Indian Reservation, consisting of approximately 70,000acres of allotted, and 260,000acres of tribal land . . . .") (JX 420); 1931 Annual Agency Report, at 4 (JX 425); 1932 Annual Agency Report, at 1 (JX 427); H.R. Rep. No. 370, 77th Cong., 1st Sess. 3 (1941) (Report submitted by Secretary of the Interior). See also S. Doc. No. 78, 66th Cong., 1st Sess. 1 (1919) (Letter of the Secretary of the Interior); H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906) (Letters of Secretary of the Interior and Commissioner of Indian Affairs); H.R. Doc. No. 1279, 60th Cong., 2d Sess. 2-3 (1909) (1908 Letters of Secretary and Commissioner of Indian Affairs); 39 I.D. 79 (1910); 34 I.D. 549, 549-50 (1906).

[23] See, e.g., Perank, J.A. 65 (and Acts cited therein); Act of July 20, 1912, 37 Stat. 196; S. Rep. No. 139, 59th Cong., 1st Sess. 1 (1906); H.R. Rep. No. 291, 59th Cong., 1st Sess. 1 (1906); S. Rep. No. 893, 62d Cong., 2d Sess. 1-2 (1912); H.R. Rep. No. 943, 62d Cong., 2d Sess. 1-2 (1912); S. Rep. No. 979, 69th Cong., 1st Sess. 1-2 (1926); H.R. Rep. No. 2047, 69th Cong., 2d Sess. 2 (1927); 74 Cong. Rec. 3408 (1931).

Characteristic of Congress's treatment is the Act of July 20, 1912, which extended the time for filing proof of entry by "any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto . . . ." 37 Stat. 196 (LD 145) (emphasis added). See also Rosebud, 430 U.S. at 603 n.25.

[24] For other references to the "former" Reservation, see H.R. Rep. No. 823, Feb. 9, 1906 (LD 122); S. Rep. No. 2561--Indian Appropriations Bill at 131, April 13, 1906 (LD 124); Public Law 258, H.R. 15331, at 375-76 (June 21, 1906) (LD 127); Senate Bill 6375 (P.L. 345), June 29, 1906 (LD 129); Public Law 144--Indian Appropriations Act, at 185, April 4, 1910 (LD 139).

[25] The complete text of the Order is set forth in Perank, J.A. 66.

[26] This is buttressed by a June 14, 1941 letter from the Lands Commissioner to the Secretary of the Interior (submitting a draft restoration order), which states that all of the undisposed lands to be restored to tribal ownership are "within the former boundaries of the Uintah and Ouray Indian Reservation . . . " (JX 450 at 1).

In sum, the 1902 Act, as amended, established a clear baseline intent to diminish the Reservation. The surrounding circumstances and subsequent legislative and administrative treatment of the area confirm that the Reservation was diminished and today includes one million acres of trust lands.[27]

B. PETITIONER, THE UNITED STATES, AND THE TENTH CIRCUIT TAKE AN UNDULY NARROW VIEW OF THIS COURT'S HOLDING IN SOLEM AND INCORRECTLY APPLY IT TO THE FACTS AND CIRCUMSTANCES OF THIS CASE

Hagen, the Ute Tribe, and the United States generally accuse the State of Utah and the Utah Supreme Court of overstating the importance of "restore to the public domain" language. See, e.g., Brief for the United States as *Amicus Curiae* in Support of Certiorari at 10-11. In doing so, the opposing parties recite a strained and unrealistically narrow interpretation of the Solem test and ignore the line of diminishment cases on which Solem relies. The *en banc* panel of the Tenth Circuit similarly misread the holding of Solem in this regard. This mistake comes from not recognizing that in all cases, including Solem, the question of diminishment involves a unique

[27] Even the Ute Tribe has treated only the trust lands as comprising its post-1905 Reservation. See, e.g., 1957 Ute Ten Year Development Program, at 66-68 (JX 465); 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473). See also Ute Tribe, J.A. 153 (Seth, J., dissenting); Perank, J.A. 69.

statute and surrounding circumstances as indicators of congressional intent.

1. The Tenth Circuit's Decision in Ute Tribe is Inconsistent With This Court's Prior Diminishment Cases and is the Only Case that Fails to Give Effect to Clear Restoration Language

As the Utah Supreme Court noted in Perank, J.A. 37, Ute Tribe is the only case standing contrary to the long line of cases recognizing "restore to the public domain" language as a clear marker of congressional intent to disestablish. The Ute Tribe majority read Solem as altering this long-standing principle of interpretation. A fair reading of Solem, however, shows this Court did not reject the firmly-established rule of interpretation concerning restoration language, but merely applied it to specific factual circumstances and statutory language and concluded that diminishment had not occurred in that case.

Unlike the language of the 1902 Act at issue here, the operative provision of the statute in Solem did not provide for the restoration of the surplus lands to the public domain. Instead, an isolated reference to "public domain" appeared in an inconsequential section providing that tribal members could harvest timber on certain portions of the opened lands "only as long as the land remained part of the public domain." Section 9, 35 Stat. 464. Although the Court acknowledged that this oblique reference was some evidence of diminishment, it nonetheless found that, because the phrase was "isolated" in a non-operative sec-

tion of the statute, it could not, by itself, be dispositive. Solem, 465 U.S. at 474-75; accord Perank, J.A. 36-37.

The Tenth Circuit failed to consider the unique facts and language at issue in Solem and instead found that restoration language "is not the same as a congressional state of mind to disestablish," and thus is not "unequivocal evidence of Congress'[s] intent to change boundaries." Ute Tribe, J.A. 99, 106. In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered the case before Solem agreed that such language was synonymous with disestablishment.[28]

The Tenth Circuit's reading of Solem is not correct. Solem did not establish new standards, and it reaffirmed--rather than altered--the principles announced in Seymour v. Superintendent, 368 U.S. 351 (1962), Mattz v. Arnett, 412 U.S. 481 (1973), DeCoteau, and Rosebud. For example, although in Rosebud and DeCoteau the Court was divided on the question of whether the particular area involved had retained reservation status, it was unanimous that "restore to the public domain" language amounted to an unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463

---

[28] In her concurring opinion in Ute Tribe (in which a majority of the judges joined), Judge Seymour stated, "Although the district court and the panel viewed ["restore to the public domain"] as language of cession, I believe Solem dictates a different result." J.A. 106. The Tenth Circuit also erred in holding that the 1905 Act superseded the 1902 Act.

(Douglas, J., dissenting); accord Seymour, 368 U.S. at 354-55; Perank, J.A. 34-36.[29]

In this case, there is no dispute that the so-called "Gilsonite Strip"--a 7,000-acre tract located on the edge of the original Uintah Valley Reservation--was disestablished by the Act of May 24, 1888, 25 Stat. 157. As Judge Seymour stated, "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip . . . ." Ute Tribe, J.A. 114. Yet the operative provisions concerning the Gilsonite Strip used the same language as the 1902 (Uintah) and 1894 (Uncompahgre) Surplus Land Acts, and expressly restored the area "to the public domain." Act of May 24, 1888, § 1, 25 Stat. 157 (LD 18). The Tenth Circuit offered no reason why the restoration language contained in those Acts should be interpreted differently, and there is none.[30]

---

[29] The analysis in these more recent decisions, though more developed, is consistent with the earlier decision of this Court in United States v. Pelican, 232 U.S. 442 (1914). In Pelican, this Court first dealt specifically with "restored to the public domain" language in legislation opening a portion of the Colville Reservation. Pelican was decided at a time contemporaneous with many of the reservation openings. Congress had provided that the north half of the Colville Reservation was to be "vacated and restored to the public domain," to be disposed of under applicable public land laws. Prior to the opening, Indians were given individual allotments. This Court held that the restoration of the lands to the public domain diminished the north half of the Reservation, except for any Indian allotments, which remained "Indian country." Pelican, 232 U.S. at 445-46. See also Seymour, 368 U.S. at 354-55.

[30] The dissent in Ute Tribe, on the other hand, relied upon the understanding of the parties regarding the effect of the 1888 Act in interpreting the 1902 (Uintah) Surplus Land Act, as amended. Ute Tribe, J.A. 139 (Seth, J., dissenting). See also Perank, J.A. 43.

The Tenth Circuit, relying on a footnote in Solem, also held that there was "considerable doubt as to what Congress meant" in using public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." Solem, 465 U.S. at 475 n.17. It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language as a general proposition. The Court had already indicated that such language supported the diminishment claim. In any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in the prior cases, regarding the significance of such restoration language. In short, Solem does not, as the Tenth Circuit believed, signal this Court's abandonment of its previous interpretations of "restoration to public domain" language. Such language continues to be a clear expression of diminishment, and the Tenth Circuit erred in holding otherwise.

Since its ruling in Ute Tribe, the Tenth Circuit has revisited the issue of the legal significance of "restore to the public domain" language, and has cast doubt on this aspect of its analysis in Ute Tribe. In its recent decision in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990), the Tenth Circuit held that a portion of the Navajo Reservation in New Mexico had been diminished when the operative section of the Executive Order opening the tract restored the disputed area to the public domain. In reaching that conclusion, the Yazzie panel was

openly critical of the treatment of the "public domain" language in Ute Tribe:

> Our conclusion in Ute that the generic phrase ["restore to the public domain"] was ambiguous is undercut . . . by our conflicting statement earlier in the same opinion that public domain language implies "a wholesale diminishment of the Reservation." Moreover, our conclusion [in Ute Tribe] is unexamined and unsupported in the opinion.

Yazzie, 909 F.2d at 1400 (emphasis added). The Yazzie court concluded:

> In summary, federal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as language of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

Id. at 1404 (emphasis added).[31] See also Perank, J.A. 37-41.

The *en banc* decision in Ute Tribe is inconsistent with the decisions of this Court and is further undercut by the Yazzie decision. At the turn of the century, reservation

---

[31] A rehearing *en banc* in Yazzie was denied by an evenly-divided vote in the Tenth Circuit.

status and public domain status were uniformly understood to be mutually exclusive. In construing restoration language as it has in Ute Tribe, the Tenth Circuit has attempted to "remake history," which cannot be done in order to resurrect a reservation diminished long ago. Rosebud, 430 U.S. at 615; DeCoteau, 420 U.S. at 449.

2. The United States' Contention that Unambiguous Language of Cession and Unconditional Compensation to the Indians is Required to Find Diminishment is Incorrect and Ignores Contemporaneous Legislation and Congressional Policy

Relying almost exclusively on Solem, the United States urges a test for diminishment that would require express language of cession, coupled with an unconditional commitment to compensate the Indians. Brief for the United States as *Amicus Curiae* at 9-12. This Court, however, has never stated that cession language is the only indicia of congressional intent to disestablish. See, e.g., Rosebud, 430 U.S. at 588 n.4.[32] Moreover, cession language necessarily implies consent of the Indians, which the Court in Lone Wolf held was not necessary to diminish a reservation. See Rosebud, 430 U.S. at 589-90, 597-98.

---

[32] The document from the National Indian Law Library referred to in Justice Marshall's dissent in Rosebud, 480 U.S. at 618 n.3, states, "Those statutes which we have titled 'restored to the public domain' are those which appear to have the clearest language of disestablishment." National Indian Law Library, Doc. No. 002279 at 2 (1973).

Further compounding its error, the United States argues that, in addition to language of cession, Congress must evidence an unconditional commitment to compensate the Indians. To the contrary, all Solem says is that language evidencing congressional intent to diminish a reservation, coupled with a commitment to compensate, creates an "almost insurmountable presumption" in favor of diminishment. Solem, 465 U.S. at 470-71; see also DeCoteau, 420 U.S. at 447-48. Nowhere does Solem, or any other decision of this Court, mandate that language of diminishment must be coupled with compensation.[33] The United States erroneously seeks to transform a presumption into a benchmark test.[34]

In addition to requiring language of cession, the United States recites an artificially narrow view of the weight to be given the contemporaneous legislative history and the circumstances surrounding the passage of a

---

[33] In fact, Rosebud says otherwise. There, a proposed amendment to an 1889 treaty provided for a fixed-sum payment and was approved by three-fourths of the adult tribal males. 430 U.S. at 587. Congress, however, never ratified that amendment, opting in 1903 for a "new policy . . . that the lands shall be . . . paid for by the settlers, and the money to be paid to the Indians only as it is received . . . from the settlers." Id. at 592 (footnote omitted). Though the Indians never consented to this payment scheme, the Court said, "In examining congressional intent, there is no indication that Congress intended to change anything other than the form of, and responsibility for, payment." Id. at 594-95. The method of payment approved in Rosebud was virtually identical to the payment scheme required by Congress for the Uintah Valley Reservation (J.A. 162).

[34] See David R. Williams, State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?", 1992 B.Y.U. L. Rev. 1247, 1258-59.

surplus lands act. The United States argues that when language of both cession and compensation are not evident from the face of the act, the legislative history and surrounding circumstances must unequivocally reveal a widely-held understanding that the reservation would shrink.

Contrary to this approach, Solem instructs us that when an act contains clear language indicating an intent to diminish, the legislative history and surrounding circumstances should still be examined, but only to buttress or confirm the language on the face of the act. Only when express language of termination is absent must the legislative history and surrounding circumstances "unequivocally" reveal a congressional understanding that a reservation would be diminished. See Solem, 465 U.S. at 471; Rosebud, 430 U.S. at 586-87. Here we have unambiguous language, coupled with supporting circumstances, revealing Congress's understanding that the Uintah Valley Reservation was diminished.

3. The United States' Position in this Case is Inconsistent with its Position in Earlier Cases Concerning Diminishment and is Contrary to the Position it Has Previously Taken with Respect to this Reservation

The United States' argument that the 1905 Act displaced the congressional intent to restore the surplus lands to the public domain is inconsistent with the position it has taken in prior litigation involving the same Acts pertaining to the Uintah Valley Reservation. In Uintah and White River Bands of Ute Indians v. United States,

139 Ct.Cl. 1 (1957), the United States entered into a stipulation adopted by the Court of Claims that quoted the 1902 Act and then succinctly stated, "Pursuant to this [1902] Act and amendments thereto . . . allotments in severalty . . . were made to the Uintah and White River Indians, and surplus lands . . . . were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians." 139 Ct.Cl. at 22 (emphasis added); see id. at 5-6. In that case, the United States (and the Utes) consistently and repeatedly maintained that the original Uintah Valley Reservation was a former reservation. Throughout its opinion and findings, the Court of Claims also treated the original Uintah Valley Reservation as having ended. E.g., id. at 2, 25, 28, 56, 64, 69, 70.[35]

The position now taken by the United States is also inconsistent with its position in prior diminishment cases before this Court. Prior to Solem, the United States consistently took the position that "restore to the public domain" language constituted a clear expression of congressional intent to diminish. In its memorandum as *amicus curiae* in Rosebud, the United States said, "[I]n DeCoteau the United States itself purchased the land . . . pursuant to an agreement with the Indians; this . . . restored the land to the public domain and extinguished the reservation." Mem. for United States in Support of

---

[35] When the Ute Indian plaintiffs appeared in the Court of Claims, they asserted in their opening statement, "Now, the Act of May 27, 1902, comes as a matter of particular importance in this suit because that is the Act as amended under which the Uintah Reservation was ultimately broken up." Tr. Jan 11, 1954 at 195, Uintah and White River Band of Utes v. United States, No. 47569 (emphasis added).

Petitioner at 13, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In its brief on the merits in the same case, the United States explained that "the clear language of other Acts expressly restoring lands to the public domain is notably absent." Brief for the United States as *Amicus Curiae* at 8, Rosebud.

In its brief on the merits in DeCoteau, the United States argued, "The absence of language in the 1891 Act expressly altering the boundaries of the reservation or returning land to the public domain shows that the reservation boundaries were not altered." Brief for the United States as *Amicus Curiae* at 16, DeCoteau v. District County Court, 420 U.S. 425 (1975) (Nos. 73-1148 & 73-1500). It also contended that "use of the word 'cede' and the [sum-certain] payment arrangement of the act did not change the Reservation boundaries," id. at 17, in direct contradiction to its position here. In its brief on the merits in Mattz, the United States said, "This Court's more recent decision in Seymour v. Superintendent . . . is, in our view, controlling here. . . . In holding that the Act did not terminate the reservation . . . the Court emphasized the absence from the Act of language abolishing the reservation or 'restoring that land to the public domain'. . . ." Brief for the United States as *Amicus Curiae* at 24, Mattz v. Arnett, 412 U.S. 481 (1973) (No. 73-1182). Even in its brief opposing the petition for a writ of certiorari in Ute Tribe, the United States said, "This is not to say that 'public domain' language is irrelevant; in some instances, it is highly probative." Brief for the United States as *Amicus Curiae* at 11, Ute Indian Tribe v. State of Utah (No. 85-1821). Finally, as noted in Perank, J.A. 68 n.25, the United States formally acknowledged before the Utah Supreme Court that the surplus lands had been restored

to the public domain pursuant to the 1902 Act and the amendments thereto.

II. PETITIONER'S COLLATERAL ESTOPPEL ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT, WERE PREVIOUSLY DISAVOWED BY HIM BEFORE THIS COURT, AND OTHERWISE LACK MERIT

Petitioner Hagen contends that the State of Utah is precluded from defending his attack on state court jurisdiction because of collateral estoppel. That issue was not raised in Hagen's Petition for a Writ of Certiorari, and is not properly before this Court. Further, Hagen's arguments lack merit.

Rule 14.1(a), Rules of the Supreme Court, provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This rule protects the theory underlying the certiorari process and prevents the practice of "smuggling" additional issues into a case after certiorari is granted. See, e.g., Irvine v. California, 347 U.S. 128, 129 (1954). Hagen's Petition for a Writ of Certiorari clearly set forth the "question presented" as whether the Reservation had been diminished by the 1902 Act so as to give the state court criminal jurisdiction over him. Nowhere in the question presented, or anywhere in the petition, is the issue of collateral estoppel raised or discussed.

Furthermore, during the petitioning process, Hagen himself recognized the parameters set by Rule 14.1(a). When the Ute Tribe, as *amicus curiae*, opposed the granting of Hagen's Petition for a Writ of Certiorari on

collateral estoppel grounds, Hagen strongly resisted the injection of a collateral estoppel issue into the case before this Court. He responded (through former counsel) as follows:

> [T]he Ute Indian Tribe couched the question presented in terms of whether the State of Utah should be prevented from relitigating the issue of whether the . . . Reservation had been disestablished. Rule 14.1.(a) . . . states that "only the question set forth in the petition or fairly included therein will be considered by the court." The question presented in the petition was whether the reservation had been diminished by acts of congress. The rule does not appear to allow different issues to be raised. . . . Regardless of the opinion held by the Ute Indian Tribe of the Perank decision, the decision has been made and is controlling in petitioner's case.

Supplemental Brief of Petitioner at 1-2. Regardless of the fact that Hagen has retained new counsel, he should not be allowed to raise a new issue not properly presented in his original Petition for a Writ of Certiorari, one which he has specifically disavowed.

Hagen also claims that, in rendering its decision on his case, the Utah Supreme Court failed to address his collateral estoppel claims. Petitioner's Brief at 25. This argument is fanciful. The primary opinion of the Utah Supreme Court in the two companion cases was rendered in State v. Perank (J.A. 18). Collateral estoppel, although not raised by Perank, was carefully addressed by the Utah Supreme Court in footnote 3 of that decision, Perank, J.A.

20-21 n.3, and that ruling applies equally to Hagen. The Utah Supreme Court noted that, even if that defense had been raised by Perank, "its application against the State of Utah would be problematic." Perank, JA 21 n.3. The Court concluded:

> [T]he issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

Id. As applied to Perank, this discussion by the Utah Supreme Court is probably dictum. However, as applied to Hagen this language is a direct and clear ruling. The Utah Supreme Court determined it would not apply the doctrine of collateral estoppel to bar litigation of the Reservation diminishment issue for reasons of public policy. Thus, Hagen's assertion that the Utah Supreme Court failed to even consider his collateral estoppel argument is without merit.[36]

---

[36] As a practical matter, even if the Hagen decision were properly reversed on collateral estoppel grounds, the Utah Supreme Court's decision in Perank would still stand, and along with it the conflict between that court and the Tenth Circuit--a conflict that can only be settled by this Court.

CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

Respectfully submitted,

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General of Utah
MICHAEL M. QUEALY
(Counsel of Record)
Assistant Attorney General
Attorneys for Respondent
State of Utah

APPENDIX

APPENDIX A

Presidential Proclamation of September 1, 1906, 34 Stat. 3228, LD 132:

WHEREAS, the Secretary of the Interior, on July 11, 1905, under the authority of the act of June 19, 1902 (32 Stats., 744) amended by the act of March 3, 1903 (32 Stats., 982, 998), and March 3, 1905 (33 Stats., 1048, 1069, reserved certain lands in the former Uintah Indian Reservation in Utah, including Lots 2 and 13 in Sec. 10, T. 2 S., R. 1 E., containing 8.80 acres, for the Uintah Indian Grazing Reserve; and whereas, the President of the United States in his proclamation of July 14, 1905, opening the lands in the said Uintah Reservation to settlement and entry, excepted from such opening the lands included in said grazing reserve; and whereas one David Eskelson was, on September 26, 1905, erroneously allowed to include in his homestead entry No. 806, the said Lots 2 and 13, on which lots he has placed valuable improvements, and which, by virtue of their small area and being entirely segregated from the balance of the grazing reserve by the claims of the Raven Mining Company, are of no value as a part of said reserve:

Now, therefore, I, THEODORE ROOSEVELT, President of the United States, by virtue of the power in my vested, do hereby declare and make known that the lots numbered 2 and 13 of Section 10, Township 2 S., of Range 1 E., Uintah Special Meridian, in Utah, are hereby restored to the public domain.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, the 1st day of September in the year of our Lord, one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

THEODORE ROOSEVELT

By the President:
ALVEY A. ADEE
Acting Secretary of State.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

AREAS OF RESPONSIBILITY AND LAND STATUS MAP

STATE OF UTAH

Scale 1:1,000,000

Polyconic projection
Datum is mean sea level

LEGEND

- County seat
- City, town, or village
- Town boundary shown for towns over 2,500 population

Paved Highways
- Interstate Highway
- Federal or State Highway
- Other Major Highways
- Two Lane Paved

Unpaved Highways
- Improved Gravel (All Weather)
- Graded Dirt
- Ungraded Dirt or 4-Wheel Primitive

Road Symbols
- Interstate
- Federal
- State
- Interchange

- District Boundary
- District Office

- Public Lands
- State Land
- Private Land
- National Forest
- National Parks & Mon.
- Military Res. & Wdls.
- Indian Land
- Wildlife Refuge

Status as of April 1, 1977

KEY

- ORIGINAL EXTERIOR BOUNDARY UINTAH VALLEY RESERVATION
- ORIGINAL EXTERIOR BOUNDARY UNCOMPAHGRE RESERVATION
- ORIGINAL EXTERIOR BOUNDARY HILL CREEK RESERVATION

W Y O M I N G

S U M M I T

WASATCH NATIONAL FOREST

ASHLEY NATIONAL FOREST

UINTA

UINTAH

AND

VERNAL

DISTRICT

W A S A T C H

OURAY

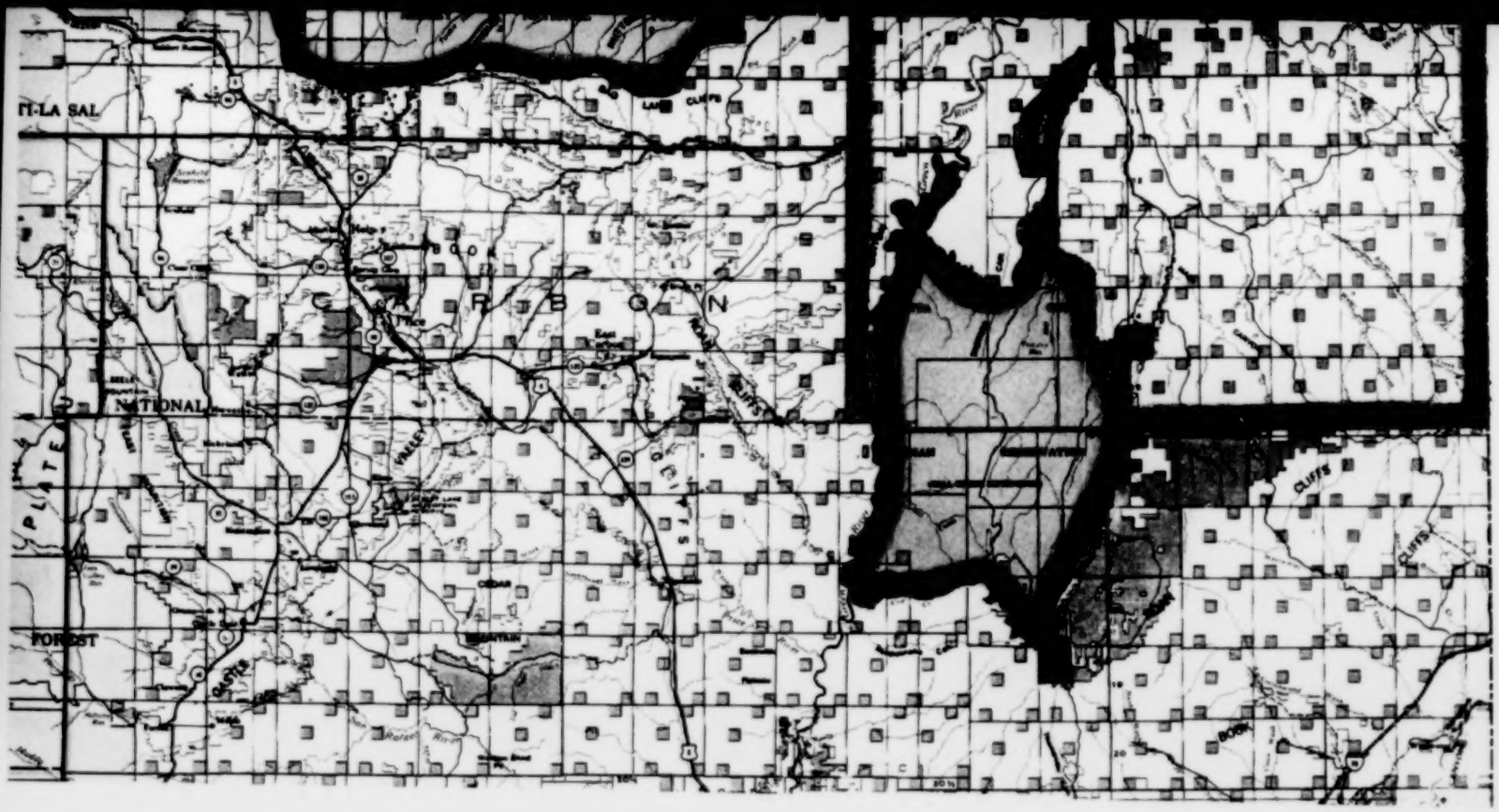
D U C H E S N E

U I N T A

INDIAN RESERVATION

S A L T

L A K E


IT-LA SAL
NATIONAL
FOREST
PLATTE
CLIFFS
CLIFFS
CLIFFS
ROCK
R A D O

APPENDIX C

Exerpts from Minutes of Councils Held by James McLaughlin, S. Indian Inspector, with the Utah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903 (JX 162):

[Inspector McLaughlin]:

Until quite recently, the policy of our Government has been that Indians had unquestioned right to all lands of their respective reservations, but a recent decision of the Supreme Court of the United States is that Indians have no right to any part of their reservations except what they may require for allotments in in [sic] severalty or can make proper use of.

This was the decision of the Supreme Court on January 5th last in the case of a Kiowa Indian of Oklahoma named Lone Wolf, which involved the question of the Indian's title to lands. The court decided that the Government had the right to legislate in regard to the surplus lands of Indians without consulting the Indians concerned. But if they take allotments, they cannot be disturbed, their title to the lands allotted to them being secured to them by law. By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments. The Secretary of the Interior and the Commissioner of Indian Affairs are very anxious that you consent to the provisions of this Act so that you may get the best of your reservation lands for yourselves. JX 162, pp. 3-4.

* * * *

As I told you yesterday, the decision of the Supreme Court is the highest authority in this land, and the Supreme Court has decided that the sovereign right of ownership of land is in the Government and the Indian is entitled to only what land he can make use of. JX 162, p. 10.

* * * *

A number of your speakers have said that you do not want your land stolen from you. My friends, these hills, these streams, these valleys will all remain just as they are. There will be no change in the nature of the country but the improvements that will come when white people come in among you. My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage. You fear that you are going to be confined to the tract of land allotted. That is not so, and I will explain a little more clearly. For many years you have occupied this large tract of land known as your reservation, and when you went outside that tract the white men you met thought you had no right to travel outside of the reservation, but when you take your allotments you can travel like white men and you will not need a pass. Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests, and as citizens you will have the protection of the laws of the state to redress injuries against you. The opening of the reservation and taking of allotments give you a great many privileges you do not enjoy at the present time. Remember your allotments are exempted from taxation for twenty five years. You will receive what is called a trust patent for your respective allotments which secures the land to the allottees and their children, and none of you can sell your individual allotments during the trust period of twenty five years. Now my friends, I think we are coming nearer each other and that you understand me. The question of opening the reservation is not with you; that has been determined by the act of congress. One of your speakers said that Washington never sent out that word before. That may be true, but I am now here to announce it to you, and my friends, I wish you to understand fully and clearly the import of the words which I convey to you. We want to discontinue useless discussion as to the opening of the reservation and take up the question whether or not you are willing to take your allotments as provided in the act.

Tim Johnson:

You do not talk like they talked to me in Washington, you talk as though you stole Washington's mouth. Here are men who were with me in Washington. The Secretary talks just the way you have been talking but the president don't talk that way. He did not talk that way when I was there. I don't believe that you come from the president. You are not from Washington; you are from

where congress is. They should not have sent you here. They should have sent some one here to ask the Indians about this first. We did not talk about this allotment when I was there. They told me "when those fellows talk don't pay attention to them. If they talk about your land like that don't let it get into your ears." While we were talking there the secretary telephoned, and Washington said "Pay no attention to him. I do not want him to come into my house. Let him stay out there." That's the reason we are holding back on this. The secretary told us about this $1.25 business. That has been talked before.

Inspector McLaughlin:

With reference to the statement Tim Johnson has made, no act of congress becomes a law until signed by the President and I am here today talking to you people and presenting to you the will of the President, because he has signed the Act and made it a law, that is, the Act of Congress for opening your reservation was approved and signed by the President and it therefore is sanctioned by him. The Act having been approved by him it now becomes the duty of the Secretary of the Interior to carry out that law, as he represents the President in Indian matters. My friends, I have no doubt but that if you were in Washington two years ago the officials of the Department may have told you that your claim to this reservation was good. That was before the decision of the Supreme Court of five months ago which I have told you of, since which decision the policy of consulting Indians in regard to opening their reservations has changed. My friends, Congress has passed a law opening your reservation and the president has consented to it by signing the Act. Under that act you may consent to take allotments of your

own selections and if you refuse they will be arbitrarily allotted to you, and in addition to your individual allotments 250,000 acres will be set apart for your common grazing grounds. That will be done on or before a year from the first day of next October and your surplus land will be thrown open for settlement on that date. Therefore, my friends, it is for you to decide whether you prefer selecting your allotments for yourselves or that they be arbitrarily assigned to you. It is useless for you to talk along the lines you have been talking. You should now confine your deliberations to the consideration of the one proposition, that is, the acceptance of your allotments. Therefore, for the remainder of this day, tonight, and tomorrow morning, confine yourselves to the consideration of this question whether you are willing to accept your allotments or have them arbitrarily allotted to you. You have been wasting time trying to discuss a matter entirely foreign to the question before you. Remember the question before you is, will you consent to accept your allotments or not? Think of this question and try to give me an answer to it to-morrow afternoon at two o'clock. We will now adjourn till two o'clock tomorrow afternoon. (JX 162, pp. 42-45).